



Federal Communications Commission
Washington, D.C. 20554

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DA 02-1969

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Re: Application for Transfer of Control
WZVN-TV, Naples, FL
File No. BTCCT-20011121AAY
Fac. ID No. 19183

Dear Gentlemen:

This is with regard to the above-referenced application seeking consent to the transfer of control of Montclair Communications, Inc. (Montclair), licensee of WZVN-TV, Channel 26 (ABC), Naples, FL, from Lara Kunkler to Waterman Broadcasting Corporation of Florida (Waterman), licensee of WBBH-TV, Fort Myers, FL.¹ On December 27, 2001, Fort Myers Broadcasting Company (FMBC), licensee of WINK-TV, Fort Myers, FL, filed a petition to deny the application.² Montclair and Waterman filed a consolidated opposition, to which FMBC filed a reply on January 16, 2002.

Common ownership of WBBH-TV and WZVN-TV will violate the local television multiple ownership rule because both stations will have overlapping Grade B contours and are located within the same Naples-Fort Myers Designated Market Area (DMA) and fewer than 8 independently owned and operating television stations would remain in the market post-merger. Moreover, both stations rank within the top four in the DMA in terms of audience share.³ Waterman, however, requests a "failing station" waiver of

¹ Waterman will be acquiring Lara Kunkler's 100% voting and equity interest in Montclair as a result of this transaction.

² FMBC has standing as a party-in-interest since it is a competitor of Waterman in the Naples-Fort Myers market. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). Waterman and Montclair argue that FMBC does not have standing since it made no showing of direct injury. A petitioner, however, "does not need to demonstrate that it will suffer a direct injury from grant" of an application where standing is based on status as a competitor in the same market. *American Mobilephone, Inc. and Ram Technologies, Inc.*, 10 FCC Red 12297, 12298 (1997).

³ Under the Commission's local television multiple ownership rule, an entity may own, operate or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research)

the local television multiple ownership rule, as set forth in Note 7 of Section 73.3555 of the Commission's rules. 47 C.F.R. §73.3555, Note 7. Waterman currently provides programming to WZVN-TV pursuant to a Time Brokerage Agreement (hereinafter "LMA") originally entered into with Elcom of Florida, Inc. (Elcom) on June 1, 1994.⁴ Montclair assumed Elcom's interest in the LMA on October 10, 1996, following acquisition of the station.

The Commission will entertain applications to waive the local television multiple ownership rule on a case-by-case basis where the station to be acquired is a failing station, a failed station, or an unbuilt station. 47 C.F.R. §73.3555, Note 7. The Commission will generally not presume that a waiver of the rule will be in the public interest under the failing station waiver standard unless the applicant can meet *each* of the following criteria: (1) one of the merging stations has had a low all-day audience share (i.e., 4% or lower); (2) the financial condition of one of the merging stations is poor (e.g. where the station has had a negative cash flow for the previous 3 years); (3) the merger will produce tangible and verifiable public interest benefits that outweigh any harm to competition and diversity; and 4) the in-market buyer is the only reasonably available candidate willing and able to acquire the failing station, and selling the station to an out-of-market buyer would result in an artificially depressed price. 47 C.F.R. §73.3555, Note 7. *Review of the Commission's Regulations Governing Broadcasting ("Television Ownership Order")*, 14 FCC Rcd 12903, 12939 (1999), *reconsideration granted in part, Memorandum Opinion and Second Order on Reconsideration*, 16 FCC Rcd 1067 (2001). An applicant that is a party to an LMA entered into prior to August 5, 1999 may base its showing on circumstances existing just prior to entering into the LMA. *Television Ownership Order*, 14 FCC Rcd at 12965. In such instances, the waiver applicant is not required to demonstrate compliance with the fourth prong. *Memorandum Opinion and Second Order on Reconsideration*, 16 FCC Rcd at 1077.

We find that Waterman has failed to make a showing demonstrating compliance with any of the applicable prongs of the "failing station" waiver standard. With respect to the first prong, Waterman states that "WZVN-TV cannot establish that its audience share never exceeded 4% either prior [to] the commencement of the LMA or at present." Waiver Showing, Exhibit 17, Page 4. Waterman does not otherwise provide specific evidence that WZVN-TV has suffered low audience share in comparison to other stations in the market, and the fact that WZVN-TV has been an ABC affiliate since February 8, 1990 would seem to belie such a conclusion.

With respect to the second prong, Waterman fails to provide figures demonstrating negative cash flow for the full three years prior to June 1, 1994, the date Waterman entered into the LMA. Instead, Waterman states only that the station suffered an "operating loss" of \$248,677 for the five months previous to August 24, 1992, and an "operating loss" of \$550,000 in 1993. Moreover, he provides no income statements or balance sheets to support these loss figures.⁵ With respect to the last three years of

if: (1) the Grade B contours of the stations do not overlap; or (2) if at least one of the stations is not ranked among the top four stations in the DMA in terms of audience share and eight or more independently owned and operating commercial and noncommercial television stations will be licensed in the DMA post-merger. 47 C.F.R. § 73.3555(b).

⁴Caloosa Television assigned the license to FCVS Communications (FCVS) on August 24, 1992 for \$4.65 million. Elcom acquired WZVN-TV from FCVS in October of 1993, and Montclair acquired WZVN-TV from Elcom in 1996 for \$21 million. See Reply to Opposition, Page 5.

⁵ Waterman states that its figures are "based on the financial statement of FCVS," and "can be made available on a confidential basis if needed." Waiver Showing, Exhibit 17, n.11. Waterman's statement fails to comply with Section 0.459 of the Commission's rules, which sets forth the requirements for submitting requests that materials or information furnished to the Commission be withheld from public inspection. 47 C.F.R. §0.459.

operation, Waterman states that the station lost over \$3 million in 1998, over \$3.9 million in 1999 and over \$3.7 million in 2000.⁶ Waterman states, however, that WZVN-TV may have a positive cash flow for the first time this year. The Petitioner challenges the figures provided by Waterman, arguing that “any claims of economic failure on the part of Montclair/Waterman result solely from the manipulation of their relationship under the TBA.” Petition to Deny, Page 11. In particular, the Petitioner argues that “an examination of both stations financials would be required for verification of the income and expense allocations between the stations,” and that “by definition, assuming the Time Brokerage Agreement was followed by the parties, the Station did not have a ‘negative cash flow’ and in fact it generated a ‘positive cash flow’ of \$16,600,000 for the period of 1995 through 2000” as a result of time brokerage fees.⁷ Petition to Deny, Page 8-9. In response, Waterman states that WZVN-TV’s situation “should be evaluated pre-TBA,” and that “WZVN-TV’s performance *under* the TBA is also irrelevant.” Joint Opposition to Petition to Deny, Page 6. Again, Waterman fails to support his assertions with audited income statements or balance sheets. We cannot, based on the inadequately supported assertions of Waterman, conclude that WZVN-TV’s financial condition was poor, either before or during the LMA.

As to the public interest benefits that could result from common ownership of WZVN-TV and WBBH-TV, Waterman makes a number of assertions, including economic efficiencies that allegedly result from the combination, assistance in the DTV transition, and the introduction of public service programming that would otherwise have been beyond WZVN-TV’s reach. Waterman also states that the combination would only counteract the market power of FMBC. Given Waterman’s failure to meet the other prongs, we do not believe that the unsupported public interest showing justifies grant of a waiver to Waterman, which would have attributable ownership interests in a television combination violating both the voice count and audience share components of the local television multiple ownership rule.

Accordingly, we grant the petition to deny to the extent set forth herein, and deny the unsupported request for waiver of Section 73.3555(b) of the Commission’s rules. Therefore, the application to transfer control of Montclair Communications, Inc., licensee of WZVN-TV, Naples, FL (File No. BTCCT-20011121AAY), is dismissed.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

⁶ These figures do not represent negative cash flow, since depreciation and amortization are not included. However, Waterman states that negative cash flow is almost as large as total losses.

⁷ According to the Petitioner, Waterman was to pay to the licensee of WZVN-TV “(a) a base fee progressing from \$2,100,000 annually in 1996 to \$5,000,000 annually in 2003, plus (b) a bonus based on cash flow from operations, plus (c) reimbursement of Montclair’s operating expenses.” Petition to Deny, Page 3.